

No. 86-1023 (3)

Supreme Court, U.S.  
FILED

FEB 27 1987

JOSEPH F. SPANIOL, JR.  
CLERK

*In the Supreme Court of the United States*

OCTOBER TERM, 1986

BLUE CROSS ASSOCIATION, ET AL., PETITIONERS

v.

GROUP HEALTH INCORPORATED, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT*

MEMORANDUM FOR THE FEDERAL RESPONDENT

CHARLES FRIED  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*

10/29/86



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## MEMORANDUM FOR THE FEDERAL RESPONDENT

Petitioner challenges the court of appeals' holding that it lacked jurisdiction to entertain an interlocutory appeal from an order denying a claim of official immunity.

1. Petitioner Blue Cross/Blue Shield of Greater New York (Blue Cross), a private, non-profit organization, acts as a "fiscal intermediary" between the suppliers of medical care and the Secretary of Health and Human Services (HHS) in the administration of the Medicare Program. Such intermediaries, although nominated by providers of health services, enter into agreements with the Secretary and act on his behalf in certain respects. See 42 U.S.C. (& Supp. II) 1395h; 42 C.F.R. 421.5(b). Intermediaries audit the provider's cost reports and pay the provider for services supplied to Medicare beneficiaries. Intermediaries also offer "a channel of communication from providers to the Secretary." 42 U.S.C. 1395h(a)(2)(A). In particular, HHS regulations mandate that "[i]n the interpretation and application of the principles of reimbursement, the fiscal

intermediaries will be an important source of consultative assistance to providers and will be available to deal with questions and problems on a day-to-day basis." 42 C.F.R. 405.406(b) (1985). The ultimate resolution of reimbursement disputes rests with the Secretary, however (see 42 C.F.R. 405.1885); an intermediary thus acts only as a "conduit" for information, and cannot resolve policy questions. See *Heckler v. Community Health Services*, 467 U.S. 51 (1984).<sup>1</sup>

2. Respondent Group Health, Inc. (GHI) is a non-profit health services corporation and a provider of health care under the Medicare Program. Blue Cross serves as its fiscal intermediary. Pet. App. A6. In 1974, GHI asked Blue Cross whether interest expenses associated with GHI's purchase of Hillcrest Hospital would be reimbursable under Medicare. Despite reservations about the transaction, Blue Cross responded affirmatively. After its purchase by GHI, Hillcrest accordingly included the interest expenses in its annual Medicare reports. In a 1977 audit, however, Blue Cross discovered that Hillcrest had not in fact made interest payments to GHI in 1974 or 1975, and it referred the matter to the Secretary. *Id.* at A6-A7. The Secretary in turn determined that Hillcrest's interest payments, even if made,

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<sup>1</sup>Because the intermediary is the agent of the Secretary, (see 42 C.F.R. 421.5(b)) agreements between intermediaries and the Secretary provide for indemnification of any intermediary "with respect to actions taken on behalf of the Administrator [of the Health Care Finance Administration, the Secretary's designee]." Such indemnification agreements also declare that "[n]o individual designated \* \* \* as a certifying officer shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payment certified by him [pursuant to this agreement]." See 42 U.S.C. 1395h(i)(1). HHS regulations provide that the Secretary, and not the intermediary, is the real party in interest in litigation involving actions taken by an intermediary while representing the Secretary. 42 C.F.R. 421.5(b).

would not be reimbursable under Medicare.<sup>2</sup> GHI's challenge to this determination was rejected by the HHS Provider Reimbursement Review Board and by the courts. *Id.* at A7-A8.

3. GHI then brought this common law tort suit against Blue Cross, alleging that Blue Cross had been negligent in failing to consult the Secretary before answering GHI's query; that Blue Cross had been negligent in stating that the Hillcrest interest payments were reimbursable; and that Blue Cross had misrepresented its authority to act as the Secretary's agent.<sup>3</sup> Blue Cross and the Secretary responded by seeking summary judgment, arguing, among other things, that the suit should be dismissed on official immunity grounds. The district court denied the summary judgment motion (Pet. App. B1-B24). The court reasoned that Blue Cross could not be deemed a federal official for immunity purposes (*id.* at B19) and that, even if it could, the existence of disputed questions of fact about "the scope of [Blue Cross's] authority" would likely preclude summary judgment (*id.* at B20).

When Blue Cross and the Secretary attempted to appeal the denial of the immunity claim, the court of appeals dismissed for lack of jurisdiction (Pet. App. A1-A13). The court acknowledged both that a district court's order denying an immunity claim may be treated as an appealable collateral order (*id.* at A11), and that Blue Cross had

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<sup>2</sup>HHS concluded that GHI's purchase of Hillcrest was not reimbursable for two reasons: because it was an investment rather than a loan (see 42 C.F.R. 405.414(a)(8) and 405.429 (1985)) and because GHI and Hillcrest were related entities (see 42 C.F.R. 405.419(3)(c) (1985)). See Pet. App. A7.

<sup>3</sup>The action was removed from state to federal court, and the Secretary was permitted to intervene to protect the interests of the intermediary, his agent. See *Group Health, Inc. v. Blue Cross Ass'n*, 587 F. Supp. 887 (S.D.N.Y. 1984).

"alleged a nonfrivolous claim that fiscal intermediaries in the Medicare program are entitled to official immunity" (*id.* at A12). But the court offered two independent reasons for concluding that Blue Cross's claim nevertheless was not appealable. First, the court held that "the immunity question cannot be decided without addressing GHI's underlying claims on the merits, including such essential and undisputed questions of fact as, for example, whether Blue Cross acted within the scope of its authority. At this stage of the litigation the immunity issues presented are not solely questions of law." *Ibid.* Second, the court noted that GHI has an outstanding claim against the Secretary under the Federal Tort Claims Act (FTCA); the court therefore concluded that "to force GHI to litigate its claims against Blue Cross and the government separately when the claims and factual issues are 'but a single controversy' results in an inefficient use of judicial resources" (*ibid.*).

4. The court of appeals' conclusion that it lacked jurisdiction to hear the appeal appears to be incorrect, in view of this Court's repeated holdings that orders denying motions to dismiss suits on official immunity grounds are immediately appealable as collateral orders. See generally *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). But because the court of appeals based its holding, at least in part, on a factual conclusion—albeit, in our view, an erroneous factual conclusion—we determined not to seek certiorari.

a. In dismissing the appeal, the court below first stated that it could not decide the immunity question without addressing the merits of GHI's claims, and particularly without determining whether Blue Cross acted within the scope of its authority when it responded to GHI's query. It is well-settled, however, that an official is entitled to

immunity in a common law tort suit so long as the challenged conduct fell within the outer bounds of his responsibilities. See *Butz v. Economou*, 438 U.S. 478 (1978); *Barr v. Mateo*, 360 U.S. 564 (1959). And there is no doubt that Blue Cross's conduct more than satisfied that standard. It is undisputed that Blue Cross did nothing more than answer GHI's question about the significance of the Hillcrest interest payments, an action that, on its face, fell within Blue Cross's regulatory obligation "to deal with [provider] questions and problems on a day-to-day basis." 42 C.F.R. 405.406(b) (1985). Of course, GHI may well be correct in asserting (Br. in Opp. 17-18, 23-24) that Blue Cross's answer to its question was incorrect, that Blue Cross lacked the authority to bind the Secretary, and that Blue Cross should have consulted the Secretary before issuing its response. See *Community Health Services*, 467 U.S. at 57, 64-65. But Blue Cross's action surely fell "within the outer perimeter" of its official duties. *Barr*, 360 U.S. at 575 (plurality opinion).<sup>4</sup>

The court of appeals' alternative rationale for dismissing the appeal—that judicial economy would be served by allowing GHI's claim against Blue Cross to proceed to trial along with its related FTCA action against the government—also is without merit. This Court has explained that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to

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<sup>4</sup>While GHI clearly is correct in stating (Br. in Opp. 13-14) that Blue Cross is not a federal official, it also is clear that Blue Cross is entitled to official immunity. Fiscal intermediaries act "on behalf of" the Secretary under 42 C.F.R. 421.5(b), are indemnified by the Secretary (see 42 U.S.C. 1395h(i)(2)) and are an integral part of the Medicare program (see 42 U.S.C. (& Supp. II) 1395h). Indeed, courts have held that an independent contractor hired by a fiscal intermediary should be deemed a governmental agent for immunity purposes. See *Bushman v. Seiler*, 755 F.2d 653 (8th Cir. 1985).

have to answer for his conduct in a civil damages action." *Mitchell*, 472 U.S. at 525. See generally *Abney v. United States*, 431 U.S. 651, 659 (1977). The Court also has made it clear that "a claim of immunity is conceptually distinct from the merits" (*Mitchell*, 472 U.S. at 527). Implicit in these conclusions is the Court's judgment that the policy against "piecemeal appeals," and associated concerns with the conservation of judicial resources, must be subordinated in cases raising claims of immunity. The court of appeals' contrary ruling here simply disregarded the analysis used in this Court's immunity decisions.

b. Having said that, we nevertheless concluded that a petition seeking review of the decision below was not warranted. The court of appeals reasoned that Blue Cross's immunity claim required a consideration of disputed questions of fact concerning the scope of Blue Cross's authority. Had the court been correct in that judgment, it also would have been correct in declining to grant the immunity claim. See *Williams v. Collins*, 728 F.2d 721, 726 n.7 (5th Cir. 1984); *Evans v. Dillahunt*, 711 F.2d 828, 830 (8th Cir. 1983).<sup>5</sup> And while, in our view, the court's factual judgment was incorrect, an interlocutory error of that sort in an unreported opinion does not merit this Court's consideration.

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<sup>5</sup>We note, however, that the court of appeals may have erred in the manner in which it disposed of the immunity claim. Here, the court held that it lacked jurisdiction to entertain Blue Cross's appeal. In contrast, other courts of appeals have suggested that, when the facts supporting an immunity claim are in dispute, an appellate court should find jurisdiction to entertain the appeal and resolve the case by ruling that the existing record simply does not support the claim of immunity. See *Heathcoat v. Potts*, 790 F.2d 1540, 1542-1543 (11th Cir. 1986). But there is no practical difference between such a ruling and the court's refusal to accept jurisdiction here; in either situation, the case returns to the district court for factual development on the immunity claim. See *Williams*, 728 F.2d at 726 n.7.

We also note that—despite the confusion evidenced by the court of appeals' alternative, "judicial economy" ground for dismissing the appeal here—the law concerning the appealability of orders denying claims of official immunity is well-settled. As we explained above, this Court has held on several occasions that such orders are immediately appealable. For their part, the courts of appeals have not expressed doubt about that proposition. See *e.g.*, *Heathcoat v. Potts*, *supra*; *Krohn v. United States*, 742 F.2d 24 (1st Cir. 1984); *Chavez v. Singer*, 698 F.2d 420 (10th Cir. 1983); *Evans v. Dillahunty*, *supra*. Indeed, the Second Circuit itself recently held that an order denying a summary judgment motion asserting claims of absolute and qualified immunity is immediately appealable. *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986). In these circumstances, the government concluded that a petition asking this Court to revisit the issue would not be warranted.

Respectfully submitted.

CHARLES FRIED  
*Solicitor General*

FEBRUARY 1987